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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ABEL HERNANDEZ, Defendant and Appellant.	G040177 (Super. Ct. No. 93NF2306) O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County, Kazuharu Makino, Judge. Affirmed.

Law Offices of Norton Tooby, Norton Tooby and Rose Cahn for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Gary W. Schons, Assistant Attorney General, James D. Dutton, Emily R. Hanks and Scott Taylor Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Defendant Abel Hernandez appeals from an order denying his motion to vacate a 1994 controlled substance conviction. He contends the attorneys that represented him before and at trial failed to provide effective assistance of counsel because they did not investigate his immigration status or seek a disposition of the prosecution avoiding the adverse immigration consequences. Alternatively, defendant attacks his waiver of a jury trial on the ground he did not knowing and intelligently waive this constitutional right. Since defendant is procedurally barred from now asserting these contentions and, in any event, his claims lack merit, we affirm the trial court's ruling.

FACTS AND PROCEDURAL BACKGROUND

Police officers watched defendant associating with known gang members making cocaine sales. At one point, defendant handled a package that he pretended to inhale before dropping it at the base of a tree. When an undercover officer attempted to buy drugs, defendant assisted a gang member in locating and retrieving the package.

The police arrested defendant and charged him with possessing cocaine base for sale (Health & Saf. Code, § 11351.5) and the sale or transportation of cocaine (Health & Saf. Code, § 11352, subd. (a)). The information also alleged he committed both crimes for the benefit of, at the direction of, or in association with a criminal street gang. (Pen. Code, § 186.22, subd. (b)(1).) Defendant entered a not guilty plea to the charges and denied the gang allegation.

Before trial, defendant and counsel for both parties waived the right to a jury trial. After the prosecution presented its case-in-chief defendant testified, denying he knew about the drug sales or assisted in selling drugs. He admitted the gang member handed him what he believed was rock cocaine, but got rid of it because "I didn't want to hold anything." When asked about holding the object up to his nose, defendant claimed he was "[j]ust playing around."

The trial judge acquitted defendant on count 2, finding the evidence insufficient to show he aided and abetted an offer to sell cocaine. But the court found defendant guilty of possessing cocaine base for sale, concluding his testimony was "not very credible on certain things" and his possession "not the type of temporary possession which is . . . in the law . . . innocent possession." In a bifurcated trial, the court also found the criminal street gang enhancement to be true. At sentencing, the court suspended imposition of sentence and placed defendant on three years' formal probation. Defendant successfully completed his probation and, in November 1998, the court ordered the case dismissed.

In December 2007, defendant filed a motion to vacate the judgment. The attached declaration stated he is a permanent resident of the United States, having come here with his parents in 1978. Upon returning from a foreign trip in early 2006, federal immigration officials detained him and initiated deportation proceedings because the 1994 conviction constituted an aggravated felony under federal law. Defendant claimed he "began saving . . . money for an attorney[] and . . . trying to piece together the facts . . . and tracking down information."

The motion asserted the attorneys who represented defendant before and at trial "failed to [either] ascertain or consider [his] immigration status when advising him to proceed to trial" or "seek a disposition that would protect [his] immigration status," and also "advised [him] to waive his right to a jury trial[] without considering [his] immigration status . . . ." After a hearing, the trial court denied the motion.

DISCUSSION

1. The Nature of Defendant's Motion

The first issue presented is respondent's claim defendant is procedurally barred from seeking to vacate the judgment of conviction at this late date.

Defendant's motion did not cite a statutory basis for relief, arguing rather that "California courts must entertain nonstatutory motions to invalidate . . . criminal convictions[] on constitutional grounds." In his opening brief, defendant focuses on the motion's merits. In its brief, respondent cites the Supreme Court's recent and factually analogous decision in *People v. Kim* (2009) 45 Cal.4th 1078. It argues defendant's postjudgment motion amounted to a petition for a writ of error *coram nobis* and he is not entitled to relief because the bases for his "motion[,] . . . allegations of ineffective assistance of counsel and the constitutionality of his jury trial waiver," are "both legal, not factual, errors."

Respondent's argument has merit. The Supreme Court has recognized "a nonstatutory motion to vacate has long been held to be the legal equivalent of a petition for a writ of error *coram nobis* [citations] . . . ." (*People v. Kim, supra,* 45 Cal.4th at p. 1096; see also *People v. Shipman* (1965) 62 Cal.2d 226, 229, fn. 2.) Relief under this petition is authorized "'only when three requirements are met. (1) Petitioner must "show that some fact existed which, without any fault or negligence on his part, was not presented to the court at the trial on the merits, and which if presented would have prevented the rendition of the judgment." [Citations.] (2) Petitioner must also show that the "newly discovered evidence . . . [does not go] to the merits of issues tried; issues of fact, once adjudicated, even though incorrectly, cannot be reopened except on motion for new trial." [Citations.] . . . (3) Petitioner "must show that the facts upon which he relies were not known to him and could not in the exercise of due diligence have been discovered by him at any time substantially earlier than the time of his motion for the writ . . . ."' [Citation.]" (*People v. Kim, supra,* 45 Cal.4th at p. 1093.)

The alleged constitutional errors cited by defendant cannot support postconviction relief under a writ of error *coram nobis*. (*People v. Kim, supra,* 45 Cal.4th at p. 1095 ["any number of constitutional claims [including ineffective assistance of counsel] cannot be vindicated on *coram nobis*"] *People v. Buggs* (1969) 272

Cal.App.2d 285, 289 [same]; *People v. Williams* (1967) 253 Cal.App.2d 560, 565 ["The writ of error *coram nobis*, which is equivalent to a motion to vacate judgment . . ., is not the proper vehicle for the review of alleged constitutional issues, such as denial of trial by jury"].) As *Kim* explained in denying *coram nobis* relief: "[W]ith regard to defendant's claims that his counsel was constitutionally ineffective for failing to investigate and for failing to negotiate a different plea, we conclude neither allegation states a case for relief on *coram nobis*. . . . [A] claim of ineffective assistance of counsel[] . . . relates more to a mistake of law than of fact . . . . Although an attorney has a constitutional duty at least not to affirmatively *misadvise* his or her client as to the immigration consequences of a plea [citation], any violation in this regard should be raised in a motion for a new trial or in a petition for a writ of habeas corpus. [Citation.]" (*People v. Kim*, *supra*, 45 Cal.4th at p. 1104; see also *People v. Sorensen* (1952) 111 Cal.App.2d 404, 405 [rejecting use of *coram nobis* petition to challenge, inter alia, denial of jury trial].)

Thus, defendant's nonstatutory motion to vacate his conviction is effectively a petition for a writ of error *coram nobis* and, since the grounds cited involve mistakes of law not fact, they cannot support relief under this procedure. Nor can defendant prevail by having his motion construed as a petition for a writ of habeas corpus. The same day the Supreme Court issued its opinion in *Kim*, it also decided *People v. Villa* (2009) 45 Cal.4th 1063. *Villa* declared a person held by federal immigration officials because of a state criminal conviction "is ineligible for relief by way of a writ of habeas corpus." (*Id.* at p. 1066.) "[P]ersons like defendant, who have completely served their sentence and also completed their probation or parole period, may not challenge their underlying conviction in a petition for a writ of habeas corpus because they are in neither actual nor constructive custody for state habeas corpus purposes." (*People v. Kim, supra,* 45 Cal.4th at p. 1108.)

In his reply brief, defendant cites *People v. Fosselman* (1983) 33 Cal.3d 572 and argues "[t]he Supreme Court has traditionally recognized that a

nonstatutory motion to vacate may be used where, as here, statutory procedures are inadequate to remedy constitutional wrongs." A review of defendant's authorities reflect they fail to support this assertion.

In *Fosselman*, the trial court denied a timely motion for new trial solely because the ground cited, ineffective assistance of counsel, was not included in Penal Code section 1181. The Supreme Court reversed. "It is true . . . section [1181] expressly limits the grant of a new trial to only the listed grounds, and ineffective assistance is not among them. Nevertheless, the statute should not be read to limit the constitutional duty of trial courts to ensure that defendants be accorded due process of law. . . . It is undeniable that trial judges are particularly well suited to observe courtroom performance and to rule on the adequacy of counsel in criminal cases tried before them. [Citation.] Thus, in appropriate circumstances justice will be expedited by avoiding appellate review, or habeas corpus proceedings, in favor of presenting the issue of counsel's effectiveness to the trial court as the basis of a motion for new trial. If the court is able to determine the effectiveness issue on such motion, it should do so." (*People v. Fosselman, supra,* 33 Cal.3d at pp. 582-583.)

But *Fosselman* and three other cases cited by defendant (*People v. Oliver* (1975) 46 Cal.App.3d 747; *People v. Cardenas* (1981) 114 Cal.App.3d 643; *People v. Davis* (1973) 31 Cal.App.3d 106) involved *statutory* new trial motions, which considered *nonstatutory* grounds for relief. Furthermore, Penal Code section 1182 expressly declares "[t]he application for a new trial must be made and determined before judgment[or] the making of an order granting probation, . . . whichever first occurs . . . ." Here, defendant did not seek relief until long after he completed his probation. The only other case authority cited by defendant is *Murgia v. Municipal Court* (1975) 15 Cal.3d 286 which involved a *pretrial* motion to dismiss a criminal prosecution on the ground of invidious discrimination.

In rejecting the defendant's request to expand the use of a *coram nobis* petition to provide a generalized postconviction, postcustody remedy, *Kim* cited several reasons, including the fact it "would accord insufficient deference to a final judgment. . . . "'For purposes of collateral attack, all presumptions favor the truth, accuracy, and fairness of the conviction and sentence; *defendant* thus must undertake the burden of overturning them. Society's interest in the finality of criminal proceedings so demands, and due process is not thereby offended."' [Citation.] Moreover, we reject defendant's argument that the interest in the finality of judgments predominates only if the judgment is just and error free. '"Endless litigation, in which nothing was ever finally determined, would be worse than occasional miscarriages of justice."' [Citation.]" (*People v. Kim, supra,* 45 Cal.4th at p. 1107.)

Based on the foregoing analysis, we conclude defendant is procedurally barred from seeking to vacate his 1994 criminal conviction on constitutional grounds.

2. Ineffective Assistance of Counsel

Even on the merits, defendant's grounds for vacating the judgment are unpersuasive.

First, defendant claims the attorneys representing him before and during trial failed to competently do so. "To establish ineffective assistance of counsel . . ., a defendant must show that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and that counsel's deficient performance was prejudicial, i.e., that a reasonable probability exists that, but for counsel's failings, the result would have been more favorable to the defendant. [Citations.]" (*In re Resendiz* (2001) 25 Cal.4th 230, 239.)

Defendant argues the attorneys who represented him "should have investigated the immigration consequences, discovered that [he] could not accept a conviction that would fall into the 'aggravated felony' deportation ground, advised [him]

of the immigration consequences . . ., and investigated possible alternatives." In support of the argument trial counsel failed to inform him of the immigration consequences of a conviction, defendant relies on *People v. Soriano* (1987) 194 Cal.App.3d 1470. *Soriano* held a defendant subjected to deportation after pleading guilty to a state criminal offense was entitled to habeas corpus relief for ineffective assistance of counsel where he "received only a pro forma caution from his attorney about the deportation consequences of his guilty plea" and "whatever advice his counsel did give him was not founded on adequate investigation of federal immigration law." (*Id.* at p. 1482.)

But in *Resendiz*, while acknowledging that affirmative misadvice can support a finding of ineffective assistance of counsel (*In re Resendiz, supra,* 25 Cal.4th at pp. 251-253), the Supreme Court noted in dicta "[w]e are not persuaded that the Sixth Amendment imposes a blanket obligation on defense counsel, when advising pleading defendants, to investigate immigration consequences or research immigration law." (*Id.* at pp. 249-250.)

Here, the parties stipulated trial counsel did not routinely provide advice to clients on the immigration consequences of a guilty plea. Nevertheless, defendant did not plead guilty to a crime. Rather, he entered a not guilty plea and defended against the charges at trial. This tactic was partially successful since the trial court acquitted defendant on count 2. As *Resendiz* acknowledged, the prejudice resulting from a criminal defense attorney's misadvice about the immigration consequences arises "by establishing that a reasonable probability exists that, but for counsel's incompetence, [the defendant] would not have pled guilty and would have insisted, instead, on proceeding to trial. [Citation.]" (*In re Resendiz, supra,* 25 Cal.4th at p. 253.) Here, defendant received a full trial on the criminal charges. No claim is made that defense counsel failed to adequately provide a defense.

Alternatively, defendant claims trial counsel was incompetent in not seeking a disposition of the case that would have resulted in adverse immigration consequences. The record does not support this claim either.

First, there is no indication the prosecution was willing to plea bargain with defendant. Nor is defendant's declaration that the attorneys who represented him before and at trial never discussed the possibility of pleading guilty to a lesser crime, sufficient to establish that he would have accepted any proposed plea bargain. "[A] defendant's self-serving statement—after trial, conviction, and sentence—that with competent advice he or she *would* have accepted a proffered plea bargain, is insufficient in and of itself to sustain the defendant's burden of proof as to prejudice, and must be corroborated independently by objective evidence. A contrary holding would lead to an unchecked flow of easily fabricated claims." (*In re Alvernaz* (1992) 2 Cal.4th 924, 938.)

Defendant's motion also presents no factual basis to conclude the trial court would have accepted any proposed plea bargain. "[A] defendant also must establish the probability that [a plea bargain] would have been approved by the trial court. . . . [¶] . . . [¶] . . . [A]lthough it may well be that in our frequently overcrowded courts, judicial rejection of plea bargains is the exception rather than the general rule, we may not simply *presume* . . . the trial court automatically would have approved a plea bargain negotiated by the prosecutor and the defense." (*In re Alvernaz*, *supra*, 2 Cal.4th at pp. 940-941, fn. omitted.)

Second, the motion's evidentiary insufficiency aside, the proposed plea bargains mentioned in defendant's opening brief do not reflect trial counsel failed to provide him with objectively reasonable representation. Citing *People v. Bautista* (2004) 115 Cal.App.4th 229, defendant argues his attorney should have tried to negotiate a plea to the "more serious offense" of violating Health and Safety Code section 11352, subdivision (a). Alternatively, he claims trial counsel should have sought a plea bargain to the crime of accessory after the fact. (Pen. Code, § 32.) He claims a conviction of

either offense "would have [had] no immigration consequences." But a review of defendant's supporting authorities reflect defendant's trial counsel would have needed to be prescient as well as competent.

Bautista involved a criminal prosecution of noncitizens who entered guilty pleas to a charge of possessing marijuana for sale, a deportable offense. The Court of Appeal remanded the case for a hearing on one defendant's petition for a writ of habeas corpus in which he argued his "attorney did not attempt to 'plead upward,' that is, pursue a negotiated plea for violation of a greater but nonaggravated offense such as sale, transport, or offer to sell or transport (Health & Saf. Code, § 11360) . . . ." (*People v. Bautista, supra*, 115 Cal.App.4th at p. 238.) The basis for this result was the then recent decision, *United States v. Rivera-Sanchez* (9th Cir. 2001) 247 F.3d 905, superseded by statute as noted in *United States v. Narvaez-Gomez* (9th Cir. 2007) 489 F.3d 970, 977. In *Rivera-Sanchez*, where the court held "by its plain words, Health and Safety Code § 11360[, subd.](a) prohibits 'offers' to transport, import, sell, furnish, administer, or give away marijuana" and "[t]hus . . . criminalizes solicitation of the enumerated acts. [¶] We have previously considered whether solicitation offenses are aggravated felonies . . . and have concluded that they are not. [Citation.]" (*United States v. Rivera-Sanchez, supra*, 247 F.3d at pp. 908-909.)

But in reaching this result, *Rivera-Sanchez* overruled the circuit's prior decision in *United States v. Lomas* (9th Cir. 1994) 30 F.3d 1191. *Lomas*, decided only a few short months after defendant's conviction in this case, held a conviction under Health and Safety Code section 11352, subdivision (a) constituted an aggravated felony under federal immigration law. (*United States v. Lomas, supra*, 30 F.3d at p. 1195.) Thus, at the time of the criminal proceedings, defendant's claim a negotiated plea to count 2 would avoid adverse immigration consequences is incorrect. The accessory after the fact plea proposal suffers from the same defect. It is based on a decision of the Board of Immigration Appeals issued in July 1997, more than three years after defendant's

conviction. (*In re Batista-Hernandez* (B.I.A. 1997) 21 I. & N. Dec. 955.) "*Strickland* does not mandate prescience, only objectively reasonable advice under prevailing professional norms. [Citation.]" (*Sophanthavong v. Palmateer* (9th Cir. 2004) 378 F.3d 859, 870.) Trial counsel's inability to predict future changes in federal immigration law cannot support an ineffectiveness of counsel claim.

Next, citing *Matter of Paulus* (B.I.A. 1965) 11 I. & N. Dec. 274, defendant argues his trial counsel should have attempted to negotiate a plea to violating Health and Safety Code section 11351.5, "but without identifying the controlled substance in the convicting papers, such that [he] would plea to an unidentified narcotic." This argument lacks merit as well.

In *Paulus*, an alien was convicted of violating a California statute that made it a crime to "'offer unlawfully to sell and furnish a narcotic . . . and . . . then sell and deliver . . . a substance . . . in lieu of such narcotic.'" (*Matter of Paulus, supra,* 11 I. & N. Dec. at p. 275.) Noting "the record being silent as to the narcotic involved in the conviction" and the fact California's definition of "narcotic" differed from that under federal law, the Board of Immigration Appeals upheld an order terminating deportation proceedings because "it cannot be said for immigration purposes, that [the permanent resident] has been convicted of a law relating to narcotic drugs." (*Ibid*.)

But *Paulus* simply involved a factual dispute over the nature of the drug the alien had been selling or furnishing. In contrast, defendant was charged with crimes specifically identifying the controlled substances as cocaine base and cocaine. Federal courts have also recognized that in determining whether a state offense constitutes an aggravated felony for federal immigration law, a court may "undertak[e] an analysis of the record of conviction," which includes "'the charging documents in conjunction with the plea agreement, the transcript of a plea proceeding, or the judgment to determine whether the defendant pled guilty to the elements of the generic crime.' [Citations.]" (*Ruiz-Vidal v. Gonzales* (9th Cir. 2007) 473 F.3d 1072, 1078; see also *Matter of Mena*

(B.I.A. 1979) 17 I. & N. Dec. 38, 39.) Thus, the proposed resolution, pleading guilty to Health and Safety Code section 11351.5 without identifying the controlled substance, would not protect defendant from being subjected to adverse immigration consequences.

For the foregoing reasons, we conclude the trial court properly concluded defendant failed to establish trial counsel had incompetently represented him in this case.

3. Waiver of the Right to a Jury Trial

Finally, defendant challenges his jury trial waiver, claiming that, since "the trial court did not explain" the right included a jury consisting of "the full cross-section of the community," his "right to participate in jury selection, the necessity that the jury be unanimously convinced of guilty beyond a reasonable doubt, or the Fifth Amendment privilege against self-incrimination" he did not knowingly and intelligently waive the right to a jury trial. We again conclude this argument fails on the merits.

a. Background

When the case was called for trial, the following colloquy occurred: "THE COURT: . . . Mr. Hernandez, your attorney indicates that you want to waive your right to have this case tried by a jury; is that correct? [¶] THE DEFENDANT: I do. [¶] THE COURT: Have you discussed what will be involved in a jury trial with your attorney? [¶] THE DEFENDANT: Yes. [¶] THE COURT: You understand that you do have a right to have this case tried by a jury, and if a jury were to consider this case, before they could return a verdict of either guilty or not guilty, that they would have to be unanimous in that; which means they would have to be all in an agreement, 12/0 for you to be found guilty. You understand that? [¶] THE DEFENDANT: Yes, I do. [¶] THE COURT: Has anyone made any promises to you or made any threats to you in order to convince you to give up your right to a jury trial? [¶] THE DEFENDANT: No. [¶] . . . [¶] THE COURT: . . . You understand . . . the maximum punishment that these charges could

carry? [¶] THE DEFENDANT: (Nodded head in the affirmative). [¶] . . . [¶] THE COURT: Do you have any questions about your right to a jury trial? [¶] THE DEFENDANT: No. [¶] THE COURT: Do you give up your right to have this case tried by a jury? [¶] THE DEFENDANT: Yes." Counsel also joined in waiving a jury trial.

b. Analysis

First, the case law on which defendant relies involved guilty pleas. As noted, defendant did not plead guilty but rather fully defended against the charges.

Second, in cases such as this one, the waiver reflected by the appellate record sufficed. "[T]he trial court in a criminal case is not required to explain to a defendant the nature and consequences of his action in waiving a jury trial where he is, as in the case at bar, represented by counsel and fails to show that either he or his counsel has been misled as to the result which might occur from his waiving a jury trial . . . ." (*People v. Lookadoo* (1967) 66 Cal.2d 307, 311; see also *People v. Tijerina* (1969) 1 Cal.3d 41 45-46 ["court was not required to explain further to defendant the significance of his waiver of a jury trial" where "[d]efendant . . . represented by an attorney . . . was carefully questioned before his waiver of a jury trial was accepted" and "stated that he knew what a jury trial was, and he was also told that 'That is when twelve people sit over here in the box and hear all the evidence'"]; *People v. Langdon* (1959) 52 Cal.2d 425, 432-433 ["There was no duty on the trial court to inquire into the waiver of a jury trial by defendant unless the trial judge had some reason, which does not appear here, to think that defendant did not understand the nature of the waiver"].)

Here, the trial judge explained defendant had a right to a jury trial and that it would need to reach a unanimous decision before returning a verdict. The judge also assured himself that defendant's waiver was not a result of any promise or threat, and also inquired whether defendant "ha[d] any questions about [the] right a jury trial."

Under this record and the foregoing cases, we conclude defendant validly waived his jury trial right.

DISPOSITION

The postjudgment order is affirmed.

RYLAARSDAM, J.

WE CONCUR:

SILLS, P. J.

MOORE, J.